A CASE FOR LIABILITY WITHOUT NEGLIGENCE AND CONVICTION AS PROOF OF NEGLIGENCE

WITH THE advancement of civilization from capitalistic societies to socialistic ones, from the individual liberty of man to the social liberty of all, the norm of *laissez-faire* has come to be displaced by the socialist school of thinking. The social interest demands a prosperous society with evenly distributed income, wherein wants and sufferings stand alleviated. Norms of social security try to safeguard the socially and economically weaker sections of society. Our Constitution has proclaimed a welfare state and the directive principles of state policy lay down the guidelines to usher in an era of socio-economic reforms and humanitarian measures for the welfare of the weaker sections of the society. Both Parliament and the state legislatures are passing many laws for establishing a social order with that object in view.

With a swarm of speedy vehicles coming on the roads the accident cases increased all over the world and in the capitalistic countries, the principle of vicarious liability was developed to ensure adequate compensation to the victims. Theories of negligence and contributory negligence thus came to be propounded as the basis of tortious liability in road accident cases for limiting the scope and amount of compensation. The idea of fault reigned supreme and the plight of the victim of the accident was almost overlooked default.

To adopt the norms and principles of the eighteenth century England, in the face of ideas prevalent now in India, would necessarily result in patch work, destroying the very purpose of our new legislation—a *reductio ad absurdem.*

However, with the formation of a welfare state in India, individuality has lost much of its significance and ideas such as protection of the weaker sections of the society and humanism dominate much of the thinking of the legislators. It is now thought that the basis of granting compensation may not be the placing of fault on a party, as the matter does not remain confined within the precincts of a personal question, but raises in its wider perspective, the question of ameliorating the sufferings of the affected persons, considering the speed of the vehicles introduced on the roads. It is now considered the duty of a welfare state to mitigate the sufferings let loose on the roads due to the state action in permitting fast running vehicles, thereby creating the risk of disabling or fatal accidents which may leave the victims or their helpless dependents economically crippled for little fault of their own. The present trend is to shift the focus of concern of the welfare law from the driver's fault to the unhappy lot of the victim of the accident or his dependents. That is why whenever an accident occurs, whether it is an air crash or a train disaster, or a road accident involving a state transport bus, the

government always comes forward immediately with an announcement of *ex gratia* grants to the victims or their dependents, without looking into the question of negligence.

The Motor Vehicles (Amendment) of Act, 1956, by which sections 110 to 110-F were substitued in the Motor Vehicles Act, 1939, appears to be a welfare legislation passed by our Parliament breaking away from the *laissez-faire* norms of personal fault or negligence prevailing in other common law countries. It creates tribunals for the early disposal of cases arising out of motor accidents. The language of sections 110 and 110-A is clear and unambiguous. The plain literal interpretation of the sections clearly indicates that the legislature has scrupulously avoided the use of any word or phrase which might imply the idea of *mens rea*, the element of fault or, to be more particular, the element of negligence as the basis of liability. The clause in section 110 of the Act which relates to compensation in respect of accidents involving the death of or bodily injury to persons arising out of the use of motor vehicles, is so broadly worded and plain enough to show that mere use of the motor vehicles as against their negligent use is enough for creating liability if another road user has suffered on that account.

This welcome change in the outlook appears to have been ignored by the judicial decisions soaked in traditionalism this radical idea appears to have been washed away in the strong currents of case-law developed in alien environments and in our attempt to blindly follow the old beaten path of negligence as the basis of all tortious liability in the case of an accident. The traditional concept of negligence was retained by a peculiar interpretation to the effect that sections 110 to 110-F are only procedural and that they only lay down a forum and procedure for the dispensation of justice under the common law of tort, which still recognises negligence as the basis of liability in such cases.

The classification of procedural and substantive law is an orthodox classification, but it is difficult to draw a clear line of distinction between them.[1] The suggested test that substantive law defines the rights while procedural law determines the remedies, is also inaccurate.[2] Judges continually advert to the distinction between 'substance' and 'procedure', between 'right' and 'remedy', but they never venture upon a general principle which affords a test for deciding into which of these catagories a given rule falls.[3] In Cheshire's *Conflict of Laws*, the learned author approves of the dictum of Coke that the line between substance and procedure cannot be drawn in the same place for all purposes.[4] Few would deny that there is a distinction between night and day, between infancy and maturity, and yet in each case

1. See Paton, *Jurisprudence* 535 (3rd ed., 1964).
2. *See* Salmond, *Jurisprudence* 503 (11th ed., 1957).
3. *See* Delimitation of "Procedure" in the Conflict of Laws. 47 *Harv. L.R.* 315 (1933).
4. Cheshire, *Conflict of Laws* 189 (3rd ed., 1947).

it is so hard to determine the precise moment of transition ; the boundary line is always hazy. Thus, to discard a radical idea introduced by a progressive legislation by resorting to this hazy line of distinction can only mean ignoring the realities of the new situation and denying to the suffering lot the very boon of benediction offered by their conscientious representatives at Parliament.

Just as article 368 of the Constitution though procedural in tenor could well concede the substantive right to amend the Constitution to Parliament by implication, as laid down in the recent *Fundamental Rights* case,[5] the provisions of sections 110 and 110-A of the Motor Vehicles Act, independently of the common law of torts, could concede a substantive right of compensation to the victim of an accident without proof of negligence on the part of the driver of the motor vehicle. In a welfare state, the victim of an accident, or his legal representatives in the event of his death, must get such compensation as would be equivalent to his loss of earning owing to the accident.

It is absurd to argue that if the element of fault is taken out from such cases people will invite accidents for becoming rich overnight. How many have travelled by aeroplanes simply for the chance of getting killed in an air crash so that their legal representatives might get the insurance amount ? Even the criminal law recognizes strict liability in some special type of offences where public welfare is involved. The idea of strict liability is not foreign to the law of torts. Why cannot the same principle be applied in claims cases arising out of motor accidents ? It is, therefore, proposed that the courts should give serious reconsideration to the question of negligence as the basis of liability in motor accidents claims cases to alleviate the sufferings of the victims or their dependents.

There is yet another anomaly of law that even if negligence of the driver comes to be fully established beyond reasonable doubt in the criminal prosecution under sections 304-A, 337 or 338, of the Indian Penal Code, as the case may be, the petitioners are required to re-establish it by independent evidence before a motor accident claims tribunal in a claim case pertaining to the same accident and the judgment of the criminal court is adjudged as inadmissible for proving it. In *Municipal Committee, Jullundur* v. *Romesh Saggi*,[6] after discussing a number of cases, the division bench of Punjab and Haryana High Court held :

> Furthermore, the nature of the onus, the approach to and effect of the evidence in a criminal case .. (are) materially different from that in a civil action. In criminal cases, the prosecution must pursue the guilt of the accused beyond the utmost bounds of doubt, to a point of moral certainty. But in civil cases, mere preponderance of pro-

5. *Kesavananda Bharati* v. *State of Kerala*, A.I.R. 1973 S.C. 1461.

6. (1969) *Accidents Claims Journal* 135 at 155

> bability may be sufficient to fasten the defendant with liability. The reason is not that the Evidence Act prescribes different standards of proof in civil and criminal cases, but because under that Act the burden of proving the guilt of the accused beyond all manner of doubt always rests on the prosecution and never shifts on the accused. This is not so in civil cases.

One can understand this distinction to be a forceful proposition of substance where the criminal court acquits the accused driver. Mere acquittal by the criminal court may not mean the complete disproof of negligence on his part because a little shadow of doubt could tilt the balance in his favour in that court. The above mentioned case of Romesh Saggi was a case where the driver had been acquitted in a criminal court. In such a case, the legal representatives of the victim must have an opportunity to establish the negligence of the driver by a preponderance of probabilities and also by having recourse to the principle of *res ipsa loquitor* which has no application in criminal cases. The special tribunal has been constituted for giving such benefit to the claimants. Therefore, by ignoring a judgment of acquittal by the criminal court, the tribunal only fulfils the object of the legislature. Kenny states :

> The common habit of the lawyers to qualify the word 'negligence' with some moral epithet such as 'wicked', 'gross' or 'culpable' has been most unfortunate since it has inevitably led to great confusion of thought and of principle. It is equally misleading to speak of criminal negligence since this is merely to use an expression in order to explain itself.
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> Nor indeed can there be degrees of inadvertence when the word is used to denote a state of mind, since it means that in the man's mind there had been a complete absence of a particular thought, a nullity ; and of nullity there can be no degrees.[7]

However, even if that philosophical quibbling is ignored, the matter would altogether different if the criminal court finds the driver guilty of criminal negligence beyond reasonable doubt. In spite of the burden being much heavier as the fact of negligence is required to be established beyond reasonable doubt, and in spite of the non-availability of the aid of the principle of *res ipsa loquitor*, if a criminal court finds a driver guilty of gross, culpable or criminal negligence, why should the tribunal not treat it as a final verdict by resorting to the principle of issue estoppel ? Why should it require the claimant to re-establish the tort of negligence with a much lighter burden to discharge ? Why should the tribunal under some assumed

7. See Kenny, *Outlines of Criminal Law* 38-39 (19th ed., 1966).

technicality of law shut its eyes to a fact proved beyond reasonable doubt before a competent court, wherein, being scared of the rod of punishment, the accused would have been more anxious and cautious to rebut it ? The provisions of sections 40 to 42 of the Evidence Act do not come in the way of the admissibility of such judgment in evidence for such a purpose.

The Court of Appeal in England observed in *Hollington* v. *Hewthorn and Company Ltd.* :[8]

> [T]hough the discussion by text-book writers.. turn on the admissibility of convictions, not of acquittals [yet] if a conviction can be admitted, not as an estoppel, but as *prima facie* evidence, so ought an acquittal....

But these observations were made in a different context and they cannot be torn out of it. Moreover, the Court of Appeal gave no reasons why the opinion of the text-book writers—which pleaded for recognition that the judgment of conviction should be admitted but not the judgment of acquittal—was incorrect.

In that case, which was a civil action for negligence, the previous conviction of the driver in another case that very day, was sought to be admitted as *prima facie* evidence of negligence. In any case, the Court of Appeal admitted in the above dictum that such a judgment of conviction could be admitted for establishing the plea of issue estoppel.

The learned judges in the case of *Romesh Saggi* referred to earlier,[9] discarded the plea of *res judicata* on the ground that the parties in a criminal case and a claim case were not the same. In a criminal case, the state was a party whereas in a claim case, the claimant was a party though the accused in the criminal case and the defendant in a claim case were one and the same person. It is submitted that the state action is representative action and, moreover, that the person against whom the finding was given by the criminal court remained one and the same in a claim case (also the issue whether A negligently killed B remained the same). How could then the nominal change of parties to a claim case affect the evidential value of the finding of negligence in a criminal case upon the same issue ?

The common law principle of issue estoppel cannot be kept meticulously bound to the same parties. It should be extended to bind the parties who were constructively represented in the previous proceedings. Otherwise, the courts may unwittingly give contradictory conclusions leaving the parties concerned bewildered. If one tribunal, *i.e.*, a criminal court in this instance, should give a finding that gross negligence of the driver was proved beyond

8. [1943] 2 All E.R. 35 at 43.

9. *Supra* note 6.

reasonable doubt and the other tribunal, *i.e.*, a motor accident claims tribunal, should give a finding on the same issue that even simple negligence of the driver is not established by preponderance of probabilities as against proof beyond reasonable doubt, would it not mean an absurd conclusion and would it not leave the parties concerned bewildered besides creating uncertainty in the law as it comes to be applied ? Would it not thereby undermine the confidence of the people in the administration of the law ?

If any such technical difficulty in the application of the principle of issue estoppel does really come in the way of dispensation of justice, a rule of evidence can be introduced by suitable legislation sanctioning the admissibility of such a judgment of conviction in support of the plea of issue estoppel in claims cases, so that the claimant may not be required to prove again what has been already proved beyond reasonable doubt. This lacuna in the law which harasses the claimants, needs eradication either through bold judicial decision in an apt case or through some welfare legislation.

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